IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN TENOPIR, Appellant,	)	
vs.	)	No. 21769
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., Appellee.	)	

Appeal from the United States District Court for the District of Alaska.

APPELLEE'S BRIEF

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JURISDICTION

This action was commenced by filing a complaint
n the United States District Court for the District of
laska. The complaint was dismissed for failure to state
claim, which order was made final (R. 84) pursuant to
ed. R. Civ. P. 54(b).

The jurisdiction for this appeal is conferred
pon the Court of Appeals by 28 U.S.C.A. §1291:

> the Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States. . . .

nd on the Ninth Circuit Court of Appeals by 28 U.S.C.A.
1294:

> Appeals from reviewable decisions of the district and territorial courts shall be taken to the Courts of Appeals as follows:
>
> (1) From a District Court of the United States to the Court of Appeals for the Circuit embracing the district;
>
> . . .

STATEMENT OF THE CASE

The facts out of which this law suit arose re not substantially in conflict. John Tenopir, while passenger in his own car (R. 1, complaint, paragraph) was injured (R. 2, complaint, paragraph VI). Howard olliheair who was the driver of Tenopir's car with enopir's permission (R. 1, complaint, paragraphs I & /) was subsequently sued by Tenopir (R. 2, complaint, aragraph VII), and a judgment was entered against olliheair in favor of Tenopir for $124,228.60 (R. 2, omplaint, paragraph XI). At the time of the accident, enopir held a policy of insurance written by defendant, tate Farm Mutual Automobile Insurance Company (R. 1, omplaint, paragraph III). In that policy Tenopir was ne named insured. Consequently, in the suit brought Tenopir against Golliheair, State Farm refused to fend Golliheair.

Tenopir, as assignee of Golliheair, then sued tate Farm in the United States District Court for the istrict of Alaska, alleging that the State Farm policy plied in the situation described above to insure lliheair against the personal injury claim of Tenopir d that State Farm had an obligation to defend lliheair against that claim (R. 2, complaint,

aragraph IX). On January 10, 1967, the United States
istrict Court for the District of Alaska dismissed
enopir's claim for failure to state a cause of action
R. 83). This appeal is brought by appellant Tenopir
rom that decision.

ARGUMENT

. THE TRIAL COURT MADE NO ERROR IN GRANTING DEFENDANT STATE FARM MUTUAL'S MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION.

A. The policy expressly prevents the named insured from seeking coverage for his own bodily injury.

The policy of automobile liability insurance ssued to John Tenopir by State Farm specifically ex- ludes from coverage the claim by him because he is he named insured. The basic insuring agreement is as ollows (R. 12, Exhibit B, page 2):

> Insuring Agreement I - The Owned Automobile.
> Coverages A and B - -
> (A) Bodily Injury Liability
> (B) Property Damage Liability
> (1) To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (A) bodily injury sustained by other persons, and (B) property damage, caused by accident arising out of the ownership, maintenance or use, including loading or unloading, of the owned automobile; and to defend any suit against the insured alleging such bodily injury or property damage and seeking damages which are payable hereunder even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigations, negotiation and settlement of any claim or suit as it deems expedient.

It must be immediately noted that the policy overage is limited to sums which "the insured shall

become legally obligated to pay because of (A) bodily injury sustained by other persons". "Other persons" clearly means other than the insured. To show that this phrase is clearly applicable to the named insured, the holder of the policy, the policy includes a definitions section (id., p. 3, R. 13):

> Definitions - - Insuring Agreements I and II Insured -- under coverages A,B,C and M the unqualified word - insured - includes
> (1) the named insured, and
> (2) if the named insured is a person, also includes his or their spouse (s), if a resident of the same household, and
> (3) if residents of-the same household, the relatives of the first person named in the declarations, or of his spouse, and
> (4) any other person while using the owned automobile, provided the operation and the actual use of such a automobile are with the permission of the named insured or such spouse and are within the scope of such permission, and
> (5) under coverages A and B any person or organization legally responsible for the use of such owned automobile by an insured as defined under the four subsections above.

Further, in the exclusions the coverage is explicitly stated not to cover the insured, as defined above, for

his bodily injury (id., p. 4, R. 14):

> Exclusions -- Insuring Agreements I and II
> This insurance does not apply under:
> * * * *
> (i) coverage A, to bodily injury to the insured, or any member of the family of the insured residing in the same household as the insured;
> . . . .

By express definition John Tenopir, the named nsured, the person whose name appears on the policy, is lways included within the meaning of the term "insured". he definition of the term "insured" includes five roups; the named insured is first. Each subsequent roup is connected to the named insured by "and". This imply means that other persons may fall within the erm "insured" depending on the situation of the moment. ut regardless of his situation the named insured always s within the term "insured". Therefore, when there is n express exclusion for coverage of bodily injuries to he insured", one need look no further than the face of he policy to find who is automatically meant. That here may be additional persons falling within the term akes no difference. John Tenopir is the named insured; onsequently, he is within the definition of "insured", nd the insurance does not apply "to bodily injury to he insured". Therefore the policy does not cover his

claims.

B. The policy is incapable of any other reasonable interpretation and consequent ambiguity.

Nonetheless, appellant contends there is ambiguity in the phraseology of the policy and that since ambiguity must be construed against the insurer, the exclusionary clause should be read differently. The central element of appellant's contention is purely grammatical. The appellant, noting that the exclusionary clause is phrased "the insured", and noting that "the unqualified word "insured" has five definitions, has found ambiguity in a singular insured excluded with multiple insureds defined. To prove "the insured" is singular, appellant relies on several arguments. First he uses the definition of "the" found in Webster, New World Dictionary (1957 World Publishing Company), 1509:

> . . . "the" (as opposed to "a") is used to refer to a particular person -- (such as) that (one) which is present, close, nearby, etc. . . .

The stress in the definition, however, is on the particularity and not the singularity. Previously in the definition, the same dictionary stated (ibid.):

> . . . the meaning is controlled by the basic notion a previously recognized, noticed, or encountered in distinction to A, AS . . .

"The" is a definite article; hence, it particularizes. Its definition is more fully explained in Webster, Third New International Dictionary (1966, G & C Merriam Company), 2368:

> ["The" is] used as a function word to indicate that a following noun or noun equivalent refers to someone or something previously mentioned or clearly understood from the context or the situation. . . .

Used as a "function word", "the" indicates that its following noun is particularized and explained elsewhere. In the policy, "insured", the noun following "the", is explained easily in the section of the policy labeled, "definitions". There we are told what the "insured" is; who is included in the term.

Webster's Third New International Dictionary recognizes many uses of "the" which particularize without singularizing, and in fact, uses which pluralize (ibid.):

> . . . used as a function word before a singular noun denoting a human being, an animal, a plant, or a precious stone to indicate that the noun is to be understood generically and not individually [helpful hints for the beginner] [courtesy distinguishes the gentlemen] [the dog was domesticated, in prehistoric times] . . . used as a function word before a noun denoting the body, the mind, or soul, or any part, attribute, or function of any of them, to indicate generic rather than individual application [the mind is clearest

> when the body is in good health] [good for the soul] . . . used as a function word before a noun denoting an object (as an implement, weapon, or musical instrument) to indicate generic rather than individual application [invention of the wheel] [users of the bow and arrow] [playing the piano] [the writing is close, analytic, sharply focused on the significant detail - William Barrett] . . .

The adjective "the" does not in any way relate to number. English is not a language in which the adjectives must agree with the nouns they modify in gender, number and case. Rather, its function is only to particularize, to make the reader aware that the noun used is a noun which is special and noted in the context, a particular noun. Here it is a particular insured, an insured particularized as the definitions sections defines that term. It is not a single insured although, again looking at the definitions section, it may be, rather it is all those persons who fit that term.

Similarly, appellant's contention that the use of the word "the" qualifies insured and excludes "the insured" from the definitions section for "the unqualified" word "insured" is untenable. "The" specifically makes insured fall within the definition clause by alerting the reader to the fact that its noun

is particularized - defined specially. If the word "the" were to qualify in any fashion it qualifies by referring the reader to the definitions section.

Appellant also contends that State Farm uses the adjective "a" and "the" interchangeably whereas they are opposites. While it is true that "a" is an indefinite article and "the" is a definite article, this is again a distinction which does not go to number. "The" is not used to denote the singular while "a" is used for the plural. Neither word connotes number; neither can be used for that purpose.

C. Courts when confronted with similar fact situations and similar policies have held the bodily injuries of the named insured excluded from coverage.

Many courts have been confronted with the same factual situations as that presented in this case as applied to substantially identical clauses in insurance policies. The following are but a few:

State Farm Mutual Automobile Insurance Co. v. Cocuzza, 91 N.J. Super. 60, 219 A2d. 190 (1966). In this case an accident occurred while the owned automobile was being operated by Ryan with the permission of the named insured, Cocuzza. Cocuzza's daughter, who was a passenger in the owned automobile, was injured in the accident. She was a member of Cocuzza's household. Cocuzza sued Ryan for his daughter's injuries. Cocuzza's

insurer, State Farm, refused to defend Ryan and brought a declaratory judgment action seeking an adjudication of non-coverage. The exclusionary clause relied on was identical to clause (i) in the present policy and the other relevant clauses were identical in substance. The court held that the policy did not insure Ryan against the claim brought by the named insured. The court stated:

> Exclusionary clauses must be examined and interpreted in the light of their design and intent as well as in view of the objects and purposes of the policy. The purpose of the relevant part of the policy in question was to provide liability coverage. The use of the word "other" in insuring agreement (1) under coverage A makes this clear. The exclusion of the named insured or any member of his family from recovery under clause (g) is in accord with this interpretation. It clearly appears that the parties intended to exclude the named insured and members of his family residing in the same household from recovery on the policy of insurance for any injuries sustained. (Citations omitted)

State Farm v. Cocuzza, supra, 219 A.2d at 193.

Shaw v. State Farm Mutual Insurance Co., 107 Ga. 8, 129 S.E.2d 85 (1962). There the named insured was a passenger in the owned automobile being driven by a third person, Shaw, with the permission of the named insured. An accident occurred in which the named insured was injured. He sued Shaw. State Farm, the insurer of the named insured,

refused to defend Shaw. Shaw settled and sued State Farm for the settlement amount plus defense costs. The policy in question was identical in substance to the present policy, and the exclusionary clause relied on by State Farm was exactly the same as clause (i) in the present policy. The court held that the policy did not cover Shaw against the claim brought by the named insured. The court pointed out that the clause corresponding to clause (i) in the present policy operated to relieve State Farm of liability. The phrase "the insured" in the exclusionary clause was held to include the named insured. The court noted that the same phrase was also used in the provisions granting coverage (paragraph 1 of the insuring agreement I) and that it must have the same meaning in both places; to say that the phrase, "the insured", did not include the named insured would make the entire contract meaningless. (id. 129 S.E.2d at 87)

Pearson v. Johnson, 215 Minn. 480, 10 N.W. 357 (1943). In this case Mrs. Pearson, wife and member of the household of the named insured, was injured in an accident occurring when she was a passenger in the named insured's automobile which was being driven by Johnson with the consent of the named insured. The named insured and Mrs. Pearson sued Johnson and received

a verdict in their favor. The named insured held a State Farm policy identical in all material respects to the present one. Johnson's insurer was Western. Both insurers' disclaimed liability in a subsequent garnishment proceeding in which Western was found liable and State Farm was exonerated. On appeal the Supreme Court of Minnesota held that the named insured and his wife could not recover on the State Farm policy. The Court stated:

> Western premises it argument that it is but secondarily liable upon the contention that Johnson was an "additional" insured under the terms of Pearson's policy with State Farm Mutual and that the provisions in subsection (e) thereof excluding from coverage "the insured or any member of the family of the insured" refer to Johnson and that therefore Ruth Pearson's action against Johnson is not excluded, she not being a member of his (Johnson's) family or household. Certainly the language used in the policy cannot be given such a strained and limited meaning. The word, "insured" is defined by the policy itself to include for the purposes named at all times the named insured, Pearson. That the policy gives it broader application so as to include persons driving with the named insured's consent cannot be said to wipe out the exemptions expressly incorporated into the policy to prevent the insured, that is, the named insured and his family from recovering for their injuries. The policy is essentially a liability and not an accident policy. It is a contract

> between Pearson and the State Farm Mutual Automobile Insurance Company by the terms of which the latter agrees to protect the former against liability incurred at the suit of anyone ouside [sic] his own family or household. Mrs. Pearson is a member of the named insured's household and family and as such is expressly excluded from coverage. The policy provisions creating additional assureds cannot change the essential contract between Pearson and his insurance company. Certainly they cannot be read so as to nullify the express exclusions of the policy.

id., 10 N.W.2d at 358.

There are many other cases. A partial list from several additional jurisdictions must include: Great American Insurance Company v. State Farm Mutual Automobile Insurance Company, 412 Pa. 538, 194 A.2d 903 (1963); Perkins v. Perkins, 284 S.W.2d 603 (Mo. App., 1955); Hogg v. State Farm Mutual Automobile Insurance Co., 276 Ala. 366, 162 So.2d 462 (1964); Kirk v. State Farm Mutual Automobile Insurance Co., 200 Tenn. 37, 289 S.W. 2d 538 (1956); Kelsay v. State Farm Mutual Automobile Insurance Co., 242 Md. 528, 219 A.2d 830 (1966); Miller v. Madison County Mutual Automobile Insurance Co., 46 Ill. App. 413, 197 N.E.2d 153 (1964).

As the three cases set out in detail above suggest there are several rationale for holding that injury to the named insured is always excluded. For

instance, as in Pearson v. Johnson, supra, many courts have felt that recovery by the named insured would radically alter the basic nature of the policy. Considering that the principal purpose of an automobile liability policy is to protect the legal liability of the named insured, with an extention over to other operators, these courts have felt that a plaintiff's verdict would translate such a liability policy into a personal accident policy for the benefit of the named insured, and have denied him any recovery.

> To accord to this policy the effect which the plaintiff claims would be to virtually insert into it another contract, distinct from public liability coverage within the scope of the policy and amounting to personal accident insurance against bodily injuries suffered by the assured. There is nothing to indicate any intention of either party to combine, in this policy, these two kinds of coverage.

Cain v. American Policyholders Ins. Co., 120 Conn. 645, 183 Atl. 403 (1936).

Yet other courts, as in State Farm Mutual Automobile Insurance Co. v. Cocuzza, supra, hold that the coverage clause itself is sufficient to determine the extent of coverage. It is for "bodily injury sustained by other persons", and the exclusionary clause merely reiterates this basic agreement. An exposition

of this rationale is contained in the lengthy analysis of similar language used in a Massachusetts Automobile Liability Statute in MacBey v. Hartford Accident and Indemnity Co., 292 Mass. 105, 197 N.E. 516, 106 A.L.R. 1269 (1935). There the statute read (id., 106 A.L.R. at 1250):

> [any automobile liability policy must provide] indemnity for or protection to the insured and any person responsible for the operation of the insured's motor vehicle with his express or implied consent against loss by reason to others for bodily injuries.

The court in construing this language held:

> In the present statute, the word "others" describing persons to whom damages are to be paid, following the words "insured" and "any person" joined as describing those to be protected by the policy, plainly shows that inclusions of the named assured within the class of beneficiaries was not within the legislative intent. As a matter of construction, the beneficiaries under the policy are denominated "others" as contrasted with "the insured" and "any person responsible for the operation of the insured's motor vehicle" who may cause the damage. The language of the statute is free from ambiguity.

id., 106 A.L.R. at 1250.

And still other courts have held that any interpretation allowing the named insured to collect for his own injuries would reduce the policy provisions to an absurdity. Shaw v. State Farm Mutual Insurance Co., supra. There the court pointed out that the word "the" was frequently coupled with the word "insured" in the basic insuring agreement. This is true in the present case; State Farm contracts to pay "on behalf of the insured all sums which the insured shall become legally obligated to pay . . ." (emphasis added). Since appellant's suggested construction would negate the basic obligation of the policy, protection of the named insured against claims of others, it necessarily must be rejected. The court in Johnson v. Employer's Liability Assurance Corp., Ltd., 158 Misc. 758, 285 N.Y.S. 574, 106 A.L.R. 1269, modified on appeal 249 App. Div. 906, 292 N.Y.S. 913 (1936) points out the difficulty and confusion that would result under the cooperation condition, when the named insured would be required, theoretically, to cooperate with the insurer at the same time he is a party plaintiff; and when the additional insured would be expected to cooperate, though by doing so, he would defeat his own claim to protection and reimbursement. (Noted in 7 Appleman, Insurance Law and Practice, §4409, note 81).

Similarly, allowing the named insured to collect for his own bodily injuries would limit the exclusion clause to the particular insured seeking the policy's protection which makes that clause meaningless. In relevant part the exclusion states that there is no insurance under "(i) coverage A, to bodily injury to the insured . . . ." Under appellant's contention "the insured" as here used can only mean a defendant being sued for personal injuries who is seeking protection of the policy. Of course, the exclusion applies as to "the insured's" own personal injuries. Since it is well established that one cannot sue oneself for one's own injuries it is clear that appellant's construction would under the clause be meaningless. This reasoning has been expressed in Shaw v. State Farm Mutual Insurance Company, supra, 129 S.E.2d at 87:

> The contention urged by Michigan would also make the exclusionary clause useless as it would then mean that the insured cannot maintain an action against himself for an injury he negligently caused to his person. This is already the law.

See also Capece v. Allstate Insurance Co., 88 N.J. Super. 535, 212 A.2d 863 (1965).

D. Appellant's authorities are themselves extraneous.

Against these authorities appellant's case law argument refers to a line of cases construing exclusions as to injuries to employees of "the insured" which come within workmen's compensation laws. It would seem that some courts have held the word "insured" in these clauses to mean the person against whom liability is asserted. This view is rejected at least as often as it is accepted. See lists of cases appearing at 50 A.L.R. 2d 97-104, and 5 A.L.R. 2d Later Case Service, 81-82 (1965). But we need not examine the merits of this controversy, for it involves a different exclusion which has distinctly different purposes. This has been judicially recognized. Maryland Casualty Co. v. New Jersey Manufacturers Insurance Co., 48 N.J. Super. 314, 137 A.2d 577, aff'd 28 N.J. 17, 145 A.2d 15 (1958), cited by plaintiff, established the rule in New Jersey that the word "insured" in the so-called "employee" exclusionary clause referred to the person seeking liability protection under the policy. The court in State Farm Mutual Automobile Insurance Co. v. Cocuzza, supra, was confronted with a factual situation and exclusionary clause substantially identical to that here. In Cocuzza, the Maryland holding was distinguished on the ground that the basis for the employee exclusion was the

employer-employee relationship between the insured defendant and the injured claimant,

> . . . and that the insured defendant must be identified as the employer before be can be suject to exclusion. The Appellate Division said: . . . "Where, as here, an employee of the named insured was not suing the named insured, who had nothing to do with the negligent action which gave rise to the employee claim, but sued an additional insured who was not his employer, the obvious purpose of the exclusionary clause is not implicated."
>
> In the present case there is involved an entirely different exclusionary clause designed for an entirely different purpose.

Cocuzza, supra, 219 A.2d at p. 193.

Appellant cites Farmer's Insurance Exchange v. Frederick, 53 Cal. Rptr. 457 (Cal App. 1966), for a case holding that an exclusionary clause excepting "the insured" meant only the person seeking the policy protection. There Frederick, owner of a pickup truck, was injured while a passenger through the negligence of Edwards who was the permissive driver. While the policy had a similar exclusion clause, "this policy does not apply under Part I: 11, to bodily injury to the insured . . . ", its coverage clause was quite different. The court specifically noted:

> . . . that the policy, following section 16451 of the Vehicle Code, contracts to insure against ". . . bodily injury to any person . . . ."

id. 53 Cal. Rptr. at 461. Earlier California decisions had already construed this broad coverage clause.

> The policy insures for loss arising out of liability of the person operating the automobile to any person or persons . . . Broader language could hardly have been used in the policy.

Budiman v. Independence Indemnity Co., 214 Cal. 529, 6 P.2d 943, (1931), quoted in 7 Appleman, Insurance Law and Practice, §4408, n. 87.

Such broad language is quite different from the coverage granted in the insurance contract between State Farm and appellant Tenopir: "To pay on-behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (A) bodily injury sustained by other persons. . . ." Further, such broad coverage as used in Frederick is required by statute in California. Cal. Veh. Code, §16451 (Cal. Stats. 1959, Ch. 3). The court in Farmer's Insurance Exchange v. Frederick, supra, was not interpreting an insurance contract; it was interpreting the legislative intent of California Veh. C.A., §16451. In fact, the case, referred to only once since decision, was quoted for that legislative interpretation, Farmer's Insurance Exchange v. Geyer, 55 Cal. Rptr 861 (Cal. App.

1967). The Alaska Motor Vehicles Safety Responsibility Act, AS 28.20.010 - AS 28.20.640, however, does not require specific wording in any policy issued in this state and does not apply to this policy. Hart v. National Indemnity Company, 422 P.2d 1015 (Alaska 1966). The determination of the extent California statutes require coverage in California is irrelevant to appellant Tenopir's coverage in Alaska.

Because of the peculiar statute there involved, Farmer's Insurance Exchange v. Frederick, supra, is inapplicable to the present case. It is clear, and all the cases construing the present exclusionary and coverage clauses so hold, that the exclusionary clause is intended to and does operate to prevent the named insured from gaining a recovery for his own injuries on his own liability policy. No other reasonable construction of the policy is possible. Appellant's contentions of ambiguity are grammatically incorrect and legally unsupported. The bodily injury of the named insured is in the policy excluded always and covered never. The policy expressly states it.

II. THE TRIAL COURT DID NOT ERR IN GRANTING STATE FARM'S MOTION TO DISMISS SINCE THERE WAS NO QUESTION OF FACT TO BE DETERMINED BY A JURY.

Appellant's alternative ground for reversal is that the ambiquities of the policy must at least be resolved by the jury as a question of intent. However, appellant refers to no reason, and there is none, why a deviation is needed in this case from the general rule that where the terms of a policy are not ambiguous the intent of the parties is to be ascertained from the instrument itself. 1 Couch, Insurance, 2d, Sec. 15.3 pp. 638-639 (1959).

CONCLUSION

For the foregoing reasons the United States District Court for the District of Alaska did not err in granting defendant State Farm Mutual's motion to dismiss for failure to state a claim, and the judgment should be affirmed.

BURR, BONEY & PEASE

By Warren W. Matthews, Jr.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Warren W. Matthews, Jr.